140

Supreme Court, U.S.
FILED

No. 09-332 SEP 14 2009

OFFICE OF THE CLERK

In The

Supreme Court of the United States

MINH "JEFF" HUYNH and
NU "CINDY" HUYNH,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARC E. GROSSBERG*
KEVIN R. PENNELL
THOMPSON & KNIGHT LLP
333 Clay Street, Suite 3300
Houston, TX 77002
Telephone: 713-654-8111
Facsimile: 713-654-1871

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Congress enacted the Civil Asset Forfeiture Reform Act to encourage lawyers to accept their highest calling: to stand with the most vulnerable of our people who are victims of governmental abuse. It does so by providing for reasonable attorney's fees, but only in successful cases. CAFRA requires the government to return property unless it notifies the owner of its intent to forfeit, and awards fees to an owner who prevails. The Government released Petitioners' property after the district court concluded that it had failed to provide notice, but the district court denied fees on the ground that Petitioners had not prevailed. Is an owner who recovers his property for lack of proper notice entitled to recover his attorney's fees under CAFRA's fee-shifting clause, 42 U.S.C. § 2465(b)?

TABLE OF CONTENTS

	Page
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. Congress enacted CAFRA to help property owners challenge forfeitures	4
II. Proper notice was a "core reform", and the Government's failure to provide it means it must return the property	11
III. Encouraging lawyers to represent owners whose property had been seized was another of CAFRA's core reforms	12
IV. The Fifth Circuit's holding encourages the Government to forfeit property administratively, rather than judicially, and without proper notice, a result at odds with Congressional intent	13
CONCLUSION	15

APPENDIX 1: Opinion of the United States Court of Appeals for the Fifth Circuit filed June 16, 2009 ..... App. 1

TABLE OF CONTENTS – Continued

Page

APPENDIX 2: Memorandum and Order of the United States District Court for the Southern District of Texas entered March 31, 2008 ..... App. 7

APPENDIX 3: Memorandum and Order of the United States District Court for the Southern District of Texas entered June 11, 2008 ..... App. 23

APPENDIX 4: Memorandum and Order of the United States District Court for the Southern District of Texas entered February 27, 2007 ..... App. 27

APPENDIX 5: 18 U.S.C. § 983 and 42 U.S.C. § 2465 ..... App. 39

TABLE OF AUTHORITIES

Page

CASES

Bennis v. Michigan, 516 U.S. 442 (1996) 5

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 5

Jones v. U.S. Drug Enforcement Administration, 819 F. Supp. 698 (M.D. Tenn. 1993) 7

Muhammed v. Drug Enforcement Agency, Asset Forfeiture Division, 92 F.3d 648 (8th Cir. 1996) 9, 10

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950) 11

United States v. $506,231 in United States Currency, 125 F.3d 442 (7th Cir. 1997) 10

United States v. All Assets of Statewide Auto Parts, Inc., 971 F.2d 896 (2d Cir. 1992) 9

United States v. Bowman, 341 F.3d 1228 (11th Cir. 2003) 10, 11

United States v. Melrose East Subdivision, 357 F.3d 493 (5th Cir. 2004) 11

United States v. Real Property in Section 9, Town 29 North, Range 1 West Township of Charlton, Otsego County, Michigan, 241 F.3d 796 (6th Cir. 2001) 11

STATUTES

18 U.S.C. § 983(a) 2

18 U.S.C. § 983(a)(1)(A)(i) 13

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 983(a)(1)(A)(ii) 13

18 U.S.C. § 983(a)(1)(F) 3, 11, 14

18 U.S.C. § 983(b) 13

18 U.S.C. § 983(e) 14

18 U.S.C. § 983(e)(5) 2

19 U.S.C. § 1609 13

21 U.S.C. § 881(a)(4) 2

21 U.S.C. § 881(e)(1)(A) 6

21 U.S.C. § 881(e)(2)(B) 6

28 U.S.C. § 524(c)(1) (Department of Justice Asset Forfeiture Fund) 6

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 2465(b) 3, 4

31 U.S.C. § 9703 (Department of Treasury Asset Forfeiture Fund) 6

OTHER AUTHORITIES

146 Cong. Rec. S1753, S1760 (2000) 10, 12

Brent Hathaway, *Executive Privateers: A Discussion of Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. Mia. L. Rev. 81 (Oct. 2000) 6, 9

TABLE OF AUTHORITIES – Continued

Page

Comprehensive Drug Abuse Prevention & Control Act, Pub. L. No. 91-513, Title II, § 511, 84 Stat. 1276 (1970) (codified at 21 U.S.C. § 881 (1994)) 6

H.R. Rep. No. 106-192, Pub. L. No. 106-185 .....*passim*

The Records of the Federal Convention of 1787 at 139 (Max Farrand ed., Yale 1937).....6

WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2, ll. 112-14 15

PETITION FOR A WRIT OF CERTIORARI

Minh "Jeff" Huynh and Nu "Cindy" Huynh respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported, but it is available at *United States v. Huynh*, Cause No. 08-20541, 2009 WL 1685139 (5th Cir. June 16, 2009). The order of the district court is not reported and is not available as an unreported opinion, but is included as Appendix 2.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals issued its opinion and judgment on June 16, 2009. The Huynhs invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions in this case, 18 U.S.C. § 983 and 24 U.S.C. § 2465, are reproduced in the Appendix.

STATEMENT OF THE CASE

The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. Two actions were consolidated: a federal forfeiture action under 21 U.S.C. § 881(a)(4) and a motion to set aside a declaration of administrative forfeiture under 18 U.S.C. § 983(e)(5). The facts giving rise to this lawsuit are as follows.

On May 26, 2004, federal agents seized numerous items of the Huynhs' personal property, including their car and jewelry, on the suspicion that they were connected to illegal narcotics trafficking. The United States sent good notices of seizure for most of these items, as required by 18 U.S.C. § 983(a). The Huynhs filed claims for the items for which they received notices of seizure, and the United States returned those items. The notices for the two most valuable items, the Huynhs' car and jewelry, were not properly addressed and the Huynhs did not receive them. The United States administratively forfeited the jewelry and initiated an *in rem* forfeiture proceeding against the car.

The Huynhs filed a claim in the *in rem* proceeding and filed an *in personam* proceeding against the United States to recover the jewelry. Under 18 U.S.C. § 983(e)(5), a motion to set aside a declaration of forfeiture is the "exclusive remedy" for one whose property has been administratively forfeited. The court ruled the United States did not give the Huynhs the notice to which they were entitled under 18

U.S.C. § 983(a) and set aside the administrative forfeiture of the jewelry.[1] The Huynhs then moved for summary judgment in both the *in rem* and *in personam* proceeding, on the basis that the court's ruling compelled the return of all their property under 18 U.S.C. § 983(a)(1)(F). The United States voluntarily returned the car and jewelry, thus mooting the motion.

Having recovered their property as the direct result of the district court's ruling, the Huynhs applied for attorney's fees and costs. The district court ruled that the attorney fees and costs could not be recovered under 28 U.S.C. § 2465(b), the fee-shifting provision of the Civil Asset Forfeiture Reform Act, for successfully voiding an administrative forfeiture.[2] The court also ruled that the Huynhs could not recover their fees in the *in rem* proceeding because the United States returned the car and moved for a voluntary dismissal without prejudice under Rule 41(a)(2).[3] In a *per curiam* opinion, the Fifth Circuit affirmed.[4]

---

[1] *See* App. 4

[2] *See* App. 2 and 3.

[3] *See* App. 2 and 3.

[4] *See* App. 1.

REASONS FOR GRANTING THE WRIT

This case concerns the Government's use of asset forfeiture to generate revenue. Prior to the Civil Asset Forfeiture Reform Act of 2000 ("*CAFRA*"), the Government would routinely seize and forfeit property, not because it was connected to illegal activity, but because its owner failed to follow the byzantine requirements for obtaining its release. When the federal judiciary criticized the Government's abuse of the civil forfeiture statutes, Congress intervened. CAFRA contains multiple protections for property owners, including the requirement that the Government provide notice of its intent to forfeit property, and a fee-shifting clause so that owners can retain counsel.

The Fifth Circuit held below that an owner who voids an administrative forfeiture and recovers his property cannot recover reasonable attorney's fees and costs as a prevailing party under 28 U.S.C. § 2465(b), but rather under the lower rate under the EAJA. This ruling will encourage the Government to forfeit property administratively without proper notice, thus eviscerating CAFRA.

I. Congress enacted CAFRA to help property owners challenge forfeitures.

Forfeiture rests upon the legal fiction that property becomes "tainted" by its association with

criminal conduct. The taint doctrine dates back to Mosaic law.[5] Forfeiture has long played a critical role in admiralty, where the vessel itself is often the only means of security because its owners are usually beyond the reach of local courts.[6] Forfeiture was an important revenue-generating device in the early days of our republic, when customs duties were an important source of revenue,[7] but it declined in

---

[5] *See* Exodus 21:28-30 ("If an ox gore a man that he shall die, the ox shall be stoned to death, and his flesh not eaten."), cited in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974) as the historical origin of forfeiture.

[6] *See Bennis v. Michigan*, 516 U.S. 442, 471 (1996) (Kennedy, J., dissenting); Holmes, Jr., The Common Law 25 (1881) ("A collision takes place between two vessels, the Ticonderoga and the Melampus, through the fault of the Ticonderoga alone. That ship is under a lease at the time, the lessee has his own master in charge, and the owner of the vessel has no manner of control over it. The owner, therefore, is not to blame, and he cannot even be charged on the ground that the damage was done by his servants. . . . Yet it is perfectly settled that there is a lien on his vessel for the amount of the damage done, and this means that the vessel may be arrested and sold to pay the loss in any admiralty court whose process will reach her. . . . The ship is the only security available in dealing with foreigners, and rather than send one's own citizens to search for a remedy abroad in strange courts, it is easy to seize the vessel and satisfy the claim at home, leaving the foreign owners to get their indemnity as they may be able.").

[7] *See* H.R. Rep. 106-192 at *3 ("Soon after the creation of the United States, ships and cargo violating the customs laws were made subject to federal civil forfeiture. Such forfeiture was vital to the federal treasury for, at that time, customs duties constituted over 80% of federal revenues.").

importance once the federal government began taxing income.[8] Until the War on Drugs.

In 1970, Congress enacted the Comprehensive Drug Abuse Prevention & Control Act,[9] making forfeiture one of many tools available to law enforcement. Fourteen years later, Congress earmarked the proceeds of forfeiture for law enforcement.[10] This raised serious, as yet unresolved, Constitutional questions, such as whether self-funding executive agencies immune from Congressional oversight violate constitutional separation of powers.[11] The temptation for

---

[8] *See* Brent Hathaway, *Executive Privateers: A Discussion of Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. Mia. L. Rev. 81 (Oct. 2000).

[9] Pub. L. No. 91-513, Title II, § 511, 84 Stat. 1276 (1970) (codified at 21 U.S.C. § 881 (1994)).

[10] *See* 28 U.S.C. § 524(c)(1) (Department of Justice Asset Forfeiture Fund), 31 U.S.C. § 9703 (Department of Treasury Asset Forfeiture Fund).

[11] As one of our Founding Fathers so aptly noted, "the purse and the sword should never fall into the same hands." George Mason, *quoted in* 1 *The Records of the Federal Convention of 1787* at 139 (Max Farrand ed., Yale 1937). Forfeited property may be used by executive agencies, *see* 21 U.S.C. § 881(e)(1)(A), or it may be auctioned and the proceeds deposited into an asset forfeiture fund, *see* 21 U.S.C. § 881(e)(2)(B). There are two asset forfeiture funds, one for the Department of Justice, *see* 28 U.S.C. § 524(c)(1), and one for the Department of Treasury, *see* 31 U.S.C. § 9703. The Huynhs challenged the constitutionality of the asset forfeiture funds on two grounds. First, self-funding executive agencies violate the Appropriations Clause, U.S. Const. Art. I, § 9 ¶ 7, which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations

(Continued on following page)

federal law enforcement to enrich its coffers by targeting assets rather than criminals was too hard to resist,[12] and the government began forfeiting property with a vengeance.

Those who resisted had to overcome several obstacles. First, once the United States established probable cause,[13] the burden shifted to the owner to prove that the property was not connected to criminal conduct, a logical impossibility.[14] Second, the owner

---

made by Law." Second, the DEA had a financial interest in the Huynhs' jewelry, thus violating their due process right to a disinterested adjudicator. The district court granted the Huynhs' motion on statutory grounds and so did not reach their Constitutional challenges.

[12] *See Jones v. U.S. Drug Enforcement Administration*, 819 F. Supp. 698, 724 (M.D. Tenn. 1993) (describing how federal law enforcement's pecuniary interest in forfeiture proceeds requires judicial vigilance).

[13] In one instance, a house was seized because "an unnamed person in prison told an unnamed government agent that an unnamed vessel was used by unnamed persons to offload cocaine at the home of decedent . . . on an unspecified date in December 1988." H.R. Rep. No. 106-192 n.67.

[14] *See* H.R. Rep. No. 106-192 at *11-12 ("When a property owner goes to federal court to challenge the seizure of property under a federal civil forfeiture law, the government is required to make an initial showing of probable cause that the property is subject to forfeiture. Under current law, the property owner must then establish by a preponderance of the evidence that the property is not subject to forfeiture. . . . The current allocation of burdens and standards of proof requires that the owner prove a negative, that the property was not used in order to facilitate illegal activity. . . . The government, under the current approach, need not produce any admissible evidence and may deprive citizens of property based on the rankest of hearsay and the

(Continued on following page)

had to post a bond[15] and hire an attorney with limited resources (because all property of value had been seized).[16] Third, if she received notice of the forfeiture at all, she had only ten days to contest it.[17] The ineluctable result was that property was often

---

flimsiest evidence. This result clearly does not reflect the value of private property in our society, and makes the risk of an erroneous deprivation intolerable.").

[15] *See* H.R. Rep. No. 106-192 at *18 ("Under current law, a property owner wanting to contest a seizure of property under a civil forfeiture statute must give the court a bond. . . . The bond is unconstitutional in cases involving indigents, because it would deprive such claimants of hearings simply because of their inability to pay. Even in cases not involving indigents, the bond should not be required. It is simply an additional financial burden on the claimant and an added deterrent to contesting the forfeiture.").

[16] *See* H.R. Rep. No. 106-192 at *14 ("There is no Sixth Amendment right to appointed counsel for indigents in civil forfeiture cases since imprisonment is not threatened. This is undoubtedly one of the primary reasons why so many civil seizures are not challenged. As the cochairs of the National Association of Criminal Defense Lawyers' Forfeiture Abuse Task Force stated before this Committee in 1996: "The reason they are so rarely challenged has nothing to do with the owner's guilt, and everything to do with the arduous path one must journey against a presumption of guilt, often without the benefit of counsel, and perhaps without any money left after the seizure with which to fight the battle.").

[17] *See* H.R. Rep. No. 106-192 at *18-19 ("Currently, a property owner has 20 days (from the date of the first publication of the notice of seizure) to file a claim with the seizing agency challenging the government's administrative forfeiture of the property. To challenge a judicial forfeiture, the property owner has an exceedingly short 10 days. . . . [F]ailure to file a timely claim often results in judgment in favor of the government.").

forfeited only because its owner failed to "perfectly navigate the bureaucratic labyrinth" of the civil forfeiture laws,[18] not because she was guilty of any crime.[19]

The federal judiciary began to take notice of the government's unseemly conduct. The Second Circuit was "enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."[20] The Seventh

---

[18] *Muhammed v. Drug Enforcement Agency, Asset Forfeiture Division*, 92 F.3d 648, 653 (8th Cir. 1996).

[19] The House Committee on Government Operations' Subcommittee on Legislation and National Security received testimony from several forfeiture victims, including Willie Jones. Willie Jones owned a landscaping company and was flying to Houston from Tennessee to purchase nursery stock. He took $9,000 in cash to the airport because no one would take an out-of-state check. Federal agents took his money despite finding no evidence of illegal activity. Billy Munnerlyn and his wife, Karen, owned and operated a successful air charter service. Unbeknownst to them, one of their customers was a drug dealer. Munnerlyn spent almost $100,000 in legal fees to recover his airplane after the feds seized it, only to find out that they had caused another $100,000 of damage to it. He had to declare bankrtupcy. *See* H.R. Rep. No. 106-192 at *6-8. A third victim, Donald Scott, was shot and killed during a raid of his ranch, a raid motivated by the hope of forfeiting his $5 million property, and a raid which uncovered no evidence of illegal drugs. *See* Brent Hathaway, *Executive Privateers: A Discussion of Why the Civil Asset Forfeiture Reform Act Will Not Significantly Reform the Practice of Forfeiture*, 55 U. Mia. L. Rev. 81 (Oct. 2000).

[20] *United States v. All Assets of Statewide Auto Parts, Inc.*, 971 F.2d 896, 905 (2d Cir. 1992).

Circuit "believe[d] the government's conduct in forfeiture cases leaves much to be desired."[21] The Eighth Circuit lamented the degree to which the forfeiture statutes favored the government.[22]

Congress enacted CAFRA in response to these concerns.[23] CAFRA was designed "to increase the due process safeguards for property owners whose property has been seized,"[24] to make the law "fair to property owners," and "to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures."[25]

---

[21] *United States v. $506,231 in United States Currency*, 125 F.3d 442, 454 (7th Cir. 1997) ("We believe the government's conduct in forfeiture cases leaves much to be desired.").

[22] *Muhammed v. Drug Enforcement Agency, Asset Forfeiture Unit*, 92 F.3d 648, 654 (8th Cir. 1996) ("We realize that the war on drugs has brought us to the point where the government may seize up to $500,000 of a citizen's property, without any initial showing of cause, and put the onus on the citizen to perfectly navigate the bureaucratic labyrinth in order to liberate what is presumptively his or hers in the first place. Should the citizen prove inept, the government may keep the property, without ever having to justify or explain its actions.") (internal citations omitted).

[23] *See* 146 Cong. Rec. S1753, S1760 (2000).

[24] H.R. Rep. No. 106-192, Pub. L. No. 106-185, Civil Asset Forfeiture Reform Act, June 18, 1999; *see also United States v. Bowman*, 341 F.3d 1228, 1236 (11th Cir. 2003).

[25] H.R. Rep. No. 106-192, Pub. L. No. 106-185 (1999); *see also United States v. Bowman*, 341 F.3d 1228, 1236 (11th Cir. 2003). The statute's very name – the Civil Asset Forfeiture *Reform* Act – shows that it is "specifically designed to rectify an

(Continued on following page)

II. Proper notice was a "core reform", and the Government's failure to provide it means it must return the property.

Notice and the opportunity to be heard are fundamental to due process.[26] Given the legislative goal of "increas[ing] the due process safeguards,"[27] it is only natural that Congress would focus on providing notice and an opportunity to be heard to owners whose property had been seized for forfeiture. Representative Henry Hyde, the bill's drafter and sponsor, identified "adequate time to contest forfeiture"[28] as a "core reform."[29] Thus, CAFRA provides that, if the United States fails to send proper notice, it must return the property.[30]

---

unfairness to the individual *vis-à-vis* the government." *United States v. Real Property in Section 9, Town 29 North, Range 1 West Township of Charlton, Otsego County, Michigan*, 241 F.3d 796, 799 (6th Cir. 2001). Congress enacted CAFRA to "provide a more *just* and *uniform* procedure for civil forfeitures." Pub. L. No. 106-185 pmb., 114 Stat. 202, 202 (emphasis added); *see also United States v. Melrose East Subdivision*, 357 F.3d 493, 502 (5th Cir. 2004).

[26] *See, e.g., Mullane v. Central Hanover Bank & Trust*, 339 U.S. 306 (1950).

[27] H.R. Rep. No. 106-192, Pub. L. No. 106-185, Civil Asset Forfeiture Reform Act, June 18, 1999; *see also United States v. Bowman*, 341 F.3d 1228, 1236 (11th Cir. 2003).

[28] H.R. Rep. No. 106-192, at *18-19 (1999), *codified at* 18 U.S.C. § 983(a)(1)(F).

[29] H.R. Rep. No. 106-192, at *11 (1999).

[30] *See* 18 U.S.C. § 983(a)(1)(F).

III. Encouraging lawyers to represent owners whose property had been seized was another of CAFRA's core reforms.

Rep. Hyde also recognized that, despite the quasi-criminal nature of civil forfeiture proceedings, owners had no Sixth Amendment right to counsel.[31] Many people lost their property, not because they had done anything wrong, but because they had no money available to hire a lawyer.[32] Thus, "appointment of counsel" for indigent owners[33] was another "core reform."[34] Although some Congressmen objected to providing counsel on the ground that "those who successfully challenge civil forfeiture decisions already are able to recover attorneys fees under the Equal Access to Justice Act,"[35] the Senate version went even further. That version, which was ultimately enacted into law, awarded attorney's fees to a prevailing owner.[36]

---

[31] H.R. Rep. No. 106-192 at *14 (1999).

[32] H.R. Rep. No. 106-192 at *14 (1999).

[33] H.R. Rep. No. 106-192 at *14 (1999).

[34] H.R. Rep. No. 106-192 at *14 (1999).

[35] H.R. Rep. No. 106-192 at *34 (1999).

[36] 146 Cong. Rec. S1753, S1756 (2000).

IV. The Fifth Circuit's holding encourages the Government to forfeit property administratively, rather than judicially, and without proper notice, a result at odds with Congressional intent.

The District Court and Fifth Circuit held that attorney's fees are not available under CAFRA's fee-shifting clause to a property owner who successfully challenges an administrative forfeiture because (1) an order setting aside administrative forfeiture is an "exclusive remedy", and (2) the fee-shifting clause applies only to a "proceeding to forfeit property", which does not include a motion to set aside a declaration of forfeiture. Neither can be reconciled with CAFRA's fundamental purpose.

When the Government seizes property it intends to forfeit, it must notify the owner,[37] who must then file a claim.[38] Once a claim is filed, the Government must initiate a judicial forfeiture proceeding.[39] If the property is not claimed, then it may be forfeited administratively.[40]

In this case, the District Court determined that the Government failed to send proper notice to the Huynhs when it administratively forfeited their jewelry. The Government is required, by statute, to

---

[37] *See* 18 U.S.C. § 983(a)(1)(A)(i).

[38] *See* 18 U.S.C. § 983(a)(1)(A)(ii).

[39] *See* 18 U.S.C. § 983(b).

[40] *See* 19 U.S.C. § 1609.

return property when it fails to send proper notice.[41] Because the notice for the car suffered from the same defects as the notice for the jewelry, the Huynhs moved for summary judgment in both the *in rem* and *in personam* proceeding. The Government conceded below that the Huynhs were entitled to the return of their car, and it returned all of their property. The Huynhs then applied for attorney's fees and costs, reasoning that they had secured relief from the court entitling them to the return of their property and thus were prevailing parties. The District Court and Fifth Circuit denied their application on the ground that they had not prevailed in any material sense, and that CAFRA did not authorize an award of attorney fees to a party who voids an administrative forfeiture.[42]

This holding will encourage the same governmental misconduct that CAFRA was designed to prevent. Law enforcement is now incentivized to seize property and forfeit it administratively without notifying the owners. To recover their property, the owners must first prove that they did not receive notice, a task which would require legal assistance.[43] Most lawyers will not represent property owners if they cannot recover reasonable legal fees for setting aside an administrative forfeiture. Thus, most owners

---

[41] *See* 18 U.S.C. § 983(a)(1)(F).

[42] *See* Appendix 1.

[43] *See* 18 U.S.C. § 983(e).

will be unable to hire a lawyer and will lose their property. This is contrary to CAFRA's intent.

CONCLUSION

It is excellent to have a giant's strength, but it is tyrannous to use it like a giant.[44] There is no entity in the world as powerful as the Government of the United States. Congress recognized this and enacted CAFRA to level the playing field. The Fifth Circuit's ruling undermines the purpose of CAFRA and encourages governmental misconduct. Minh "Jeff" Huynh and Nu "Cindy" Huynh pray that this Court grant the writ, reverse the Fifth Circuit Court of Appeals, and remand to the District Court for further proceedings.

Respectfully submitted,

MARC E. GROSSBERG
Counsel of Record

KEVIN R. PENNELL

THOMPSON & KNIGHT LLP
333 Clay Street, Suite 3300
Houston, TX 77002
Telephone: 713-654-8111
Facsimile: 713-654-1871

[44] WILLIAM SHAKESPEARE, MEASURE FOR MEASURE act 2, sc. 2, ll. 112-14.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 08-20541

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

MINH HUYNH, also known as Jeff Huynh; NU HUYNH, also known as Cindy Huynh

Claimants-Appellants

- -

NU "Cindy" HUYNH; MINH "Jeff" HUYNH

Plaintiffs-Appellants

v.

FERDINAND "Andy" LARGE, ET AL.

Defendants

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06-CV-399
USDC No. 4:05-CV-1155

(Filed Jun. 16, 2009)

Before REAVLEY, WIENER, and SOUTHWICK, Circuit Judges.

PER CURIAM:*

Plaintiffs-Appellants Nu and Minh Huynh appeal the magistrate judge's judgment on attorneys' fees and costs entered in two consolidated actions: one brought by Plaintiffs to set aside the Government's administrative forfeiture of their jewelry, and the other initiated by the Government seeking judicial forfeiture of Plaintiffs' vehicle. Reviewing the fee award for abuse of discretion and the conclusions of law underlying it *de novo, see Navigant Consulting, Inc. v. Wilkinson,* 508 F.3d 277, 297 (5th Cir. 2007), we AFFIRM for the following reasons:

1. We agree with the magistrate judge that Plaintiffs' success on their claim under 18 U.S.C. § 983(e) to set aside the administrative forfeiture of certain jewelry for lack of sufficient notice does not permit the recovery of reasonable attorneys' fees available to a substantially prevailing party under the Civil Asset Forfeiture Reform Act of 2000 ("CAFRA"), 28 U.S.C. § 2465(b)(1). Because the requested fee award implicates the Government's sovereign immunity, any waiver of immunity must be "*unequivocally expressed*, with all uncertainties being

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

resolved in favor of the [G]overnment." *Boehms v. Crowell*, 139 F.3d 452, 463 (5th Cir. 1998) (emphasis in original). Moreover, the "American Rule" generally precludes fee-shifting absent "*express* statutory authorization to the contrary." *Id.* By its plain terms, CAFRA's fee-shifting provision applies only to civil proceedings "*to forfeit* property," that is, civil forfeiture actions initiated by the Government. 28 U.S.C. § 2465(b)(1) (emphasis added). *Cf. Carvajal v. United States*, 521 F.3d 1242, 1247 (9th Cir. 2008) (explaining that the parallel provision of CAFRA providing for payment of interest, § 2465(b)(1)(C), "is triggered *only* when the government institutes civil forfeiture proceedings" and the party seeking fees "substantially prevails" (emphasis in original)). Plaintiffs' claim, in contrast, seeks to *set aside* a forfeiture that has already occurred. 18 U.S.C. § 983(e). Far from unequivocally and expressly authorizing Plaintiffs' fee request, the statutory language of § 2465(b)(1) clearly does not apply to their action pursuant to 18 U.S.C. § 983(e).

2. Contrary to Plaintiffs' assertion, adherence to the plain text of § 2465(b)(1) does not create absurd results. Unlike a successful defense against a Government-initiated judicial forfeiture action, a claim to set aside an administrative forfeiture neither resolves the substantive merits of the forfeiture nor prevents the Government from seizing the property again. *See* 18 U.S.C. § 983(e)(1)(A) & (B) (limiting the grounds for setting aside administrative forfeiture to instances where the government failed reasonably to

provide notice and the moving party neither knew nor had reason to know of the seizure within sufficient time to file a claim); § 983(e)(2)(A) (noting the exclusive remedy is to set aside the forfeiture without prejudice to the government's commencement of a forfeiture proceeding); *Mesa Valderrama v. United States*, 417 F.3d 1189, 1196 (11th Cir. 2005) (agreeing with the government that the complainant's merits-based challenge to the forfeiture can only be resolved in a civil judicial forfeiture proceeding, since challenges under § 983(e) are limited to "the process of forfeiture"). This distinction between the permanence and degree of relief obtained logically supports a corresponding difference in the availability of attorney's fees under CAFRA.

3. The magistrate judge also correctly rejected Plaintiffs' request pursuant to § 2465 for attorneys' fees in connection with the civil action to forfeit their BMW sports-utility vehicle, a claim that the Government voluntarily dismissed without prejudice. The judge's finding of deficient notice with respect to Plaintiffs' jewelry did not constitute a finding that the notice as to the vehicle was also insufficient, because the latter issue was not actually or necessarily decided due to the Government's dismissal of the action and return of the vehicle to Plaintiffs. *See, e.g., Alpha/Omega Ins. Servs., Inc. v. Prudential Ins. Co. of Am.*, 272 F.3d 276, 279 (5th Cir. 2001) (explaining that law of the case applies only to issues "that were actually decided" or were "decided by necessary implication" (internal quotation marks omitted)); *In re Gober*, 100

F.3d 1195, 1200 n.2 (5th Cir. 1996) (defining collateral estoppel as barring "relitigation of issues that were actually litigated and decided in a previous action"). Nor does the Government's dismissal without prejudice bestow prevailing party status on Plaintiffs because it effected no "change in the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598, 605, 121 S. Ct. 1835, 1840 (2001); *see also, e.g., RFR Indus., Inc. v. Century Steps, Inc.*, 477 F.3d 1348, 1353 (Fed. Cir. 2007) (reasoning that voluntary dismissal that leaves the plaintiff free to refile his claim effects no change in the parties' legal relationship). The return of Plaintiffs' car did nothing to prevent the Government from seizing it again. Additionally, the court entered no order with respect to the car addressing the merits of the forfeiture claim prior to its voluntary dismissal. Without the "necessary judicial imprimatur," Plaintiffs cannot establish prevailing party status as to this action. *Buckhannon*, 532 U.S. at 605, 121 S. Ct. at 1840 (emphasis removed).

4. We also find no abuse of discretion in the amount of attorneys' fees and costs awarded to Plaintiffs for prevailing on their claim related to the jewelry under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) and 28 U.S.C. § 1920. Under well-established law, the district court had no jurisdiction to resolve challenges to seizure of the jewelry except for its compliance with procedural and due process requirements. *See Bailey v. United States*, 508 F.3d 736, 738-39 (5th Cir. 2007) (explaining that the

district court's jurisdiction at this juncture is limited to "whether the forfeiture comported with constitutional *due process* guarantees," which, in turn, require notice reasonably calculated to apprise the complainant of the forfeiture action and an opportunity to object (internal quotation marks and citation omitted) (emphasis added)); *United States v. Schinnell,* 80 F.3d 1064, 1069 (5th Cir. 1996) (limiting jurisdiction to review of compliance with "procedural requirements or to comport with due process"). Thus, fees incurred by Plaintiffs for attacking the constitutionality of the forfeiture statutes as a whole under the Appropriations Clause and the separation-of-powers doctrine, over which the district court clearly lacked jurisdiction, were appropriately excluded. As for Plaintiffs' entitlement to costs associated with the deposition of a witness, their failure affirmatively to request those expenses in their initial motion below waives any right to recovery.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, V. 2002 BMW, MODEL X-5, Defendant.	§ § § § § § § §	CIVIL ACTION NO. H-05-1155

CONSOLIDATED WITH

MINH "JEFF" HUYNH and, NU "CINDY" HUYNH Plaintiffs, v. UNITED STATES OF AMERICA, FERDINAND "ANDY" LARGE, JOHN HIERONYMUS, RAYMOND D'ALESSIO, and JOHN DOE # 1-10, Defendants.	§ § § § § § § § § § § §	CIVIL ACTION NO. H-06-0399

ORDER

Pending is the Huynhs' Motion and Application for Attorney's Fees and Costs (Document No. 93). Having considered the motion, the United States' response (Document No. 94), the parties' evidence and additional written submissions (Document Nos. 96, 100, 101, 102, 103, 104, 105, 108 and 109), the parties' oral argument at a hearing held on January 10,

2008, and the claims and issues that were presented and resolved in this case, the Court ORDERS, for the reasons set forth below, that the Huynhs' Motion and Application for Attorney's Fees and Costs (Document No. 93) is GRANTED in PART.

I. Background

On May 26, 2004, the United States Drug Enforcement Administration ("DEA") seized jewelry, a 2002 BMW Model X-5 ("BMW"), cash, and other personal property from claimants Minh and Nu Huynh (the "Huynhs"). The DEA was acting under 21 U.S.C. § 881, which provides for the forfeiture of property that is used to facilitate or acquired with the proceeds of illegal narcotics trafficking. At the time of the seizure, the DEA provided receipts to the Huynhs for all property that was taken. On July 23, 2004, the DEA began administrative forfeiture proceedings against the various pieces of property by sending seven separate notices of forfeiture to the Huynhs. Five of the notices, including those for the cash and personal property, were addressed correctly and subsequently received by the Huynhs. However, the notices for the jewelry and the BMW were addressed with the incorrect zip code, and were returned to the DEA as undeliverable. The DEA also sent Notices of Seizure for the BMW and the jewelry to Mike DeGeurin, a criminal defense attorney who was representing the Huynhs in the criminal matter relating to the DEA search of their home. However, Mr. DeGeurin did not acknowledge receipt of the notices

until over a year later, on August 3, 2005, after receiving an inquiry from the Huynhs' attorney in this case.

The Huynhs made numerous inquiries and claims for the return of the jewelry, personal and business records and the BMW. The DEA, however, found the claims incomplete because they lacked the Asset Identification Number found on the Notice(s) of Seizure. The DEA sent the Huynhs an additional notice for the BMW on November 17, 2004, thereby enabling the Huynhs to file a claim for the BMW at the administrative level. That administrative claim for the BMW prompted the United States to file a judicial *in rem* forfeiture against the BMW, *United States v. 2002 BMW, Model X-5*, Civil Action Number H-05-1155. An additional notice to the correct address was never sent for the jewelry and, on December 20, 2004, the jewelry was declared administratively forfeited. The Huynhs filed suit under 18 U.S.C. § 983(e), seeking to set aside the declaration of forfeiture as to the jewelry, *Minh Huynh and Cindy Huynh v. United States, et al.,* Civil Action No. H-06-0399. In that same case, the Huynhs alleged claims for violations of their Fourth and Fifth Amendment rights, conversion and trespass to chattel against the United States, three named DEA agents, and several John Doe Defendants, based on the seizure and forfeiture of the jewelry, and the seizure of their personal and business records, $1,000 cash and the personal property that was in the BMW at the time the BMW was seized. As relief, the Huynhs' asked for

return of the jewelry or its monetary equivalent, and, in the alternative, damages.

The two related cases were consolidated by Order entered on February 15, 2006. (Document No. 42). Subsequent to the consolidation, the Huynhs amended their complaint to delete their claims against the individual defendants, and to delete their tort claims against the United States as they related to the seizure and forfeiture of the jewelry. Therefore, the Huynhs' tort claims against the Government related solely to the United States' seizure of their personal and business records, the $1,000 in cash, and the personal property that was in the BMW at the time it was seized, none of which had been forfeited, but none of which had been returned at the time the case was filed.

During the course of the litigation, in a Memorandum and Order entered on February 27, 2007, the administrative forfeiture of the jewelry was set aside, but "without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the Huynhs in the jewelry." (Document No. 73). As for the BMW and the Huynhs' personal and business records, the Government agreed to voluntarily return that property to the Huynhs and all claims related thereto were dismissed. (Document No. 88).

The Huynhs now seek to recover, as prevailing parties under 28 U.S.C. §§ 2412, 2465, all their attorney's fees and costs. The United States, in addition to

arguing that the Huynhs are not prevailing parties within the meaning of §§ 2412 and 2465, maintain that an award of attorneys fees in this case is not reasonable and that the amount sought by the Huynhs is excessive and patently unreasonable.

II. Discussion – Attorneys Fees Under 28 U.S.C. § 2465

Pursuant to 28 U.S.C. § 2465, a prevailing party in a forfeiture proceeding with the United States may recover attorneys fees and costs. Section 2465 provides in pertinent part:

> (a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law –
>
> > (1) such property shall be returned forthwith to the claimant or his agent; and
> >
> > (2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).
>
> (b)(1) Except as provided in subparagraph (2), in any civil proceeding to forfeit property

> under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for –
>
> > (A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant[.]
> >
> > * * *
> >
> > (2)(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

A claimant in a civil forfeiture action substantially prevails, within the meaning of § 2465(b), when "he obtains a dismissal with prejudice, summary judgment, or a judgment on the merits after a trial. All of these successful outcomes for a claimant would have *res judicata* effect." *United States v. $13,275.21 in United States Currency,* 2007 W.L. 316455 *4 (W.D. Tex. 2007).

Here, the muddled procedural history of this case, including the consolidation of the two actions – one of which was filed by the Government seeking a judicial forfeiture of the BMW, and the other of which was filed by the Huynhs seeking to set aside the administrative forfeiture of the jewelry – tends to obscure the applicability of § 2465. As provided for in § 2465(b) itself, attorneys fees are available "[u]pon the entry of a judgment for the claimant . . . in any civil proceeding *to forfeit property.*" Here, the only proceeding *to forfeit property* was that initiated by the

United States in Civil Action No. H-05-1155, for the judicial forfeiture of the BMW. The Huynhs' action, Civil Action No. H-06-0399, in contrast, was a civil proceeding under 18 U.S.C. 983, to set aside the administrative forfeiture of the jewelry – not a proceeding *"to forfeit property."* While this may seem like a distinction without a difference, it is not.

The only remedy available to the Huynhs with respect to the jewelry was the setting aside of the administrative forfeiture. 18 U.S.C. § 983(e)(5) ("A motion under this subsection shall be the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute."). In such a case, the district court has jurisdiction to decide whether the claimant received proper notice of the proposed administrative forfeiture, but it has no jurisdiction to decide whether the forfeiture was otherwise valid or supportable. *Mesa Valderrama v. United States,* 417 F.3d 1189, 1196 (11th Cir. 2005) ("The court has determined that it lacks jurisdiction to review the merits of administrative or nonjudicial forfeiture determinations. Instead, the court's review 'is limited to determining whether the agency followed the proper procedural safeguards' in forfeiting [the claimant's property]") (internal citations omitted); *Horn v. U.S. Dept. of Justice Drug Enforcement Admin.,* 2007 W.L. 2740140 at *3 (E.D. Pa. 2007) ("the subject matter jurisdiction of federal courts to review administrative forfeiture proceedings is limited to determination of whether the property claimant received adequate notice of the administrative

forfeiture proceedings."); *United States v. Russell*, 2006 W.L. 2786883 *2 (M.D. Ala. 2006) (court does not have jurisdiction to review a claimant's challenges to a forfeiture on the merits, but it "does have jurisdiction over claims seeking review of the adjudicatory process itself"). The nature of the Huynhs' action related to the jewelry is therefore essential to their request for attorneys fees, for in the absence of a "proceeding to forfeit property," § 2465 makes no provision for attorney's fees.

Given the nature of the Huynhs' claim related to the jewelry, attorneys fees and costs are not available to them under § 2465, regardless of whether they can be characterized as having substantially prevailed on their motion to set aside the administrative forfeiture. As for the Huynhs' claims related to the BMW and their personal and business records, given the Government's agreement to return that property and voluntarily dismiss without prejudice their judicial forfeiture claims, the Huynhs are not prevailing parties within the meaning of § 2465. *See United States v. $13,275.21 in United States Currency*, 2007 W.L. 316455 *4-*5 (W.D. Tex. 2007) (where Government voluntarily dismissed judicial forfeiture proceeding, claimant could not be considered to have substantially prevailed within the meaning of § 2465); *United States v. $660,220.00 in United States Currency*, 438 F.Supp.2d 67, 73 (E.D.N.Y. 2006) (claimant, who settled a judicial forfeiture proceeding, did not "substantially prevail[ ]" for purposes of entitlement to attorney's fees under § 2465).

III. Discussion – Attorneys Fees Under 28 U.S.C. § 2412 (Equal Access to Justice Act)

Under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, a prevailing party in a suit involving the United States may recover costs, and reasonable attorneys fees and expenses. Section 2412 provides in pertinent part as follows:

> The Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A), provides, in pertinent part:
>
> [e]xcept as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action . . . , including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
>
> In addition, the statute states that
>
> "fees and other expenses" includes . . . reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of services furnished, except that . . . attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited

availability of qualified attorneys for the proceedings involved, justifies a higher fee.)

28 U.S.C. § 2412(d)(2)(A) (1994 and Supp. 1999).

The Huynhs argue that they are prevailing parties within the meaning of § 2412, and that the Government's position was not substantially justified. The Government, in response, maintains that the Huynhs are not prevailing parties because the only relief they gained was a return to the position they were in prior to the seizure of their property.

A party is a prevailing party entitled to costs, attorneys fees and expenses under the EAJA "'if [he] succeed[s] on any significant issue in litigation which achieves some of the benefit [he] sought in bringing suit.'" *Davidson v. Veneman,* 317 F.3d 503, 506 (5th Cir. 2003) (quoting *Sims v. Apfel,* 238 F.3d 597, 599-600 (5th Cir. 2001)). Here, the Huynhs cannot be considered prevailing parties with respect to the BMW, because the United States voluntarily dismissed its claim for judicial forfeiture without prejudice. A voluntary dismissal without prejudice cannot be said to have changed the legal relationship between the parties to confer prevailing party status on the Huynhs. *See Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Svcs.,* 532 U.S. 598, 605 (2001) ("A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial imprimatur on the change. Our precedents thus counsel against

holding that the term 'prevailing party' authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties."); *United States v. Marion L. Kincaid Trust,* 463 F.Supp.2d 680, 691 (E.D. Mich. 2006) (where the Government voluntarily dismisses a case *with* prejudice, the defendant is to be considered a prevailing party for purposes of the EAJA). As for the Huynhs' action to set aside the administrative forfeiture of the jewelry, the Huynhs were prevailing parties in that action because they achieved all the relief available to them under 18 U.S.C. 983(e).

In addition, the Government has not shown that its position was substantially justified with respect to the jewelry. Although the Government argues in response to the Huynhs' motion for attorney's fees that this litigation was unnecessary because the Huynhs had all the information they needed to make an administrative claim for the jewelry prior to the time that the jewelry was declared administratively forfeited, it is clear that the Huynhs did not, regardless of when the administrative forfeiture was entered, gain the required notice within time to file a *timely* claim to the property. The United States' argument, made for the first time in response to the Huynh's request for attorney's fees, that it would have accepted the Huynhs' claim to the jewelry whether it was timely made or not is pure speculation and cannot support a conclusion that the United

States' position in this litigation was substantially justified.[1] The Huynhs are therefore entitled to costs and reasonable attorneys fees under the EAJA on their claim to set aside the administrative forfeiture of the jewelry. The amount of reasonable fees available under the EAJA is, however, far less than the $161,000.00 the Huynhs seek in their motion.

Under the EAJA, the Huynhs are limited to attorney's fees at the statutory hourly rate of $125.00, plus any enhancement based on a significant increase in the cost of living since the $125.00 hourly rate was enacted in 1996. The Huynhs have neither requested a cost of living enhancement of the EAJA rate, nor provided the Court with any evidence to support an enhancement of the statutory hourly rate of $125.00, based on an increase in the cost of living. *See Miller v. Apfel,* 2001 W.L. 1142763 *3 (N.D. Tex. 2001) ("it is Petitioner's burden to prove either an increase in the cost of living or a special factor"). Moreover, an

---

[1] "The burden of proving substantial justification falls to the Government. It must show, based on the record (including the record with respect to the decisions of the agency upon which the civil action is based), that it acted reasonably at all stages of the litigation." *Davidson v. Veneman,* 317 F.3d 503, 506 (5th Cir. 2003) (internal citations omitted). In determining whether the Government's position was substantially justified, the Court is to "'focus on two questions: first, whether the government was substantially justified in taking its original action; and, second, whether the government was substantially justified in defending the validity of the action in court.'" *United States v. Marolf,* 277 F.3d 1156, 1161 (9th Cir. 2002) (quoting *Kali v. Bowen,* 854 F.2d 329, 332 (9th Cir. 1988)).

enhancement of the hourly rate based on counsel's experience or the novelty of the issues presented is not warranted. *See United States v. $660,200.00 in United States Currency,* 438 F.Supp.2d 67, 70 (E.D. N.Y. 2006) ("an attorney's skill, no matter how extraordinary, is not a consideration under the EAJA special factors cap increase"); *Hall v. Shalala,* 50 F.3d 367, 369 (5th Cir. 1995) ("the Supreme Court has made it clear that reasonable market rates for attorneys cannot be considered as a special factor justifying an upward adjustment of the cap"). Therefore, the hourly rate for work performed by counsel for the Huynhs on the claim(s) on which they prevailed in this case will be the statutory EAJA rate of $125.00.

As for determining the reasonable amount of time spent by counsel on the claims related to the administrative forfeiture of jewelry, that is difficult given the nature of counsel's time records, the nature of the relief sought by the Huynhs, and limited relief they obtained. Clearly, however, the Huynhs are not entitled to attorney's fees for time spent pursuing their claims related to the BMW. In addition, because the Huynhs cannot be said to have prevailed on any of the constitutional claims or arguments they raised, they are likewise not entitled to recover attorney's fees for time spent on such claims. They are also not entitled to recover attorney's fees related to the motion for summary judgment that they filed after they had received all the relief they were entitled to under § 983(e)(5) with respect to the jewelry. As for the remaining amount of attorney time that can

reasonably be attributed to work done in relation to the jewelry – particularly, the Huynhs' Amended Motion to Set Aside the Forfeiture, and their response to the Government's Motion to Dismiss such claims – such attorney time (calculated from counsel's billing records as 150.80 hours) is recoverable given the Huynhs' success on the Amended Motion for Leave to Set Aside the Forfeiture. The work done by counsel on the initial Motion to Set Aside the Forfeiture, however, is not recoverable, as it can be viewed as duplicative, at least in part, of that work done in connection with the Amended Motion to Set Aside the Forfeiture. The remaining attorney time, which can be characterized as falling into the broad categories of work done on pleadings, discovery, case and client management issues, and the pursuit of attorney's fees (calculated from counsel's time records as 208.70 hours),[2] cannot fairly or reasonably be attributed solely to work related to the jewelry. Instead, such time can only be fairly attributable to work done on *both* the BMW and the jewelry, and will be equally apportioned as such.

Limiting the amount of attorney time claimed in this manner, and not differentiating between counsel's experience given the applicable EAJA rate, the

---

[2] This does not include the time charged in relation to work performed by Charlie Lestage, Todd Lowther, Beverly Veuleman, Angelia Belsan or Catherine Whitney, none of whom has been identified as an attorney, but does include the attorney time identified by counsel in their Reply Brief (Document No. 109).

Court concludes that the Huynhs and their counsel are entitled to recover for 255.15 hours of attorney time (150.80 hours attributable to the work done primarily in relation to the jewelry; and 104.35 hours apportioned to work done in relation to the jewelry) for their successful pursuit of their Amended Motion to Set Aside the Administrative Forfeiture, at a rate of $125.00, for a total attorney's fee award of $31,893.75. None of the factors discussed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974), clearly warrant an increase in this amount.

As for the Huynhs request for costs and/or expenses in the amount of $4,195.87, a substantial portion of this amount ($2595.45) reflects filing fees and copy costs that are recoverable under 28 U.S.C. § 1920. The remaining amounts are generally chargeable to a client as expenses, and are therefore recoverable under § 2412.

IV. Conclusion and Order

Because the Huynhs are not entitled to attorneys fees under 28 U.S.C. § 2465, in connection with the claims raised in either Civil Action No. H-05-1155, or Civil Action No. H-06-0399, but are entitled to costs, and reasonable attorneys fees and expenses related to their pursuit of their Amended Motion to Set Aside the Administrative Forfeiture of the jewelry, it is

ORDERED that the Huynhs' Motion and Application for Attorney's Fees and Costs (Document No.

93) is GRANTED in PART and the Huynhs are awarded $31,983.75 in attorney's fees and $4195.87 in costs and expenses.

Signed at Houston, Texas, this 31st day of March, 2008.

/s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	CIVIL ACTION
V.	§	NO. H-05-1155
2002 BMW, MODEL X-5,	§	
Defendant.	§	

CONSOLIDATED WITH

MINH "JEFF" HUYNH and, NU "CINDY" HUYNH	§	
Plaintiffs,	§	CIVIL ACTION
v.	§	NO. H-06-0399
UNITED STATES OF AMERICA, FERDINAND "ANDY" LARGE, JOHN HIERONYMUS, RAYMOND D'ALESSIO, and JOHN DOE # 1-10,	§	
Defendants.	§	

ORDER

Pending is the Huynhs' Motion to Amend Judgment (Document No. 111), in which the Huynhs seek reconsideration, under FED. R. CIV. P. 59(e), of the award of attorneys fees in this case. According to the

Huynhs, they are entitled to attorneys fees under 28 U.S.C. § 2465(b), and the Government conceded as much in its response to the Huynhs' Motion and Application for Attorneys Fees and Costs. Alternatively, the Huynhs argue that they are entitled to an enhancement of the hourly rate provided for under the Equal Access to Justice Act ("EAJA"), based on cost of living increases since the current EAJA rate was established. Having considered the motion, the response, the parties' extensive briefing on the issue of attorneys fees prior to the entry of the Order on March 31, 2008, granting in part the Huynhs' Motion and Application for Attorneys Fees and Costs, the proof the Huynhs submitted in connection with their Motion and Application for Attorneys' Fees and Costs, and the absence of any explicit or implicit concession by the Government that the Huynhs were entitled to attorneys fees under § 2465(b), the Court concludes, for the reasons set forth more fully below, that the Huynhs' Motion to Amend Judgment is DENIED.

A motion to alter or amend a judgment under Rule 59(e) must be made within ten days of the entry of judgment, and should only be granted if there has been an "manifest error of law or mistake of fact" or where there is newly discovered evidence. *Templet v. Hydrochem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004). A Rule 59(e) motion cannot be used to rehash "evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment." *Id.* Reconsideration under Rule 59(e) "is an extraordinary remedy that should be used sparingly. *Id.*

Here, having considered the Huynhs' motion, the Court finds no manifest error of law in its determination that the Huynhs are not entitled to attorneys fees under 28 U.S.C. § 2465. Section 2465 makes no provision for attorneys fees in a case in which a party seeks to set aside an administrative forfeiture – it only provides attorneys fees in a case in which a forfeiture is sought. This may, as argued by the Huynhs, seem unfair and counterintuitive given that they did prevail by getting the administrative forfeiture of the jewelry set aside, the Court cannot glean from the statutory language, or any case law, Congressional authority for an award of attorneys fees in this case under § 2465.

As for the fee award under EAJA, which was not enhanced based on increases in the cost of living, while the Court acknowledges that the Huynhs would have been entitled to such an enhancement if one had been requested and the amount of the enhancement proven, the record shows that no such request was made by the Huynhs, and no proof was offered to support an enhancement. The Huynhs request, in their motion for reconsideration, for an enhancement of the EAJA hourly rate, comes too late. *See Templet,* 367 F.3d at 479 ("We have held that an unexcused failure to present evidence available at the time of summary judgment provides a valid basis for denying a subsequent motion for reconsideration.").

Based on the foregoing and the conclusion that there was no manifest error of law, no mistake of fact, and no newly discovered evidence that would justify

an amendment of the attorneys fee award in this case, it is

ORDERED that the Huynhs' Motion to Amend Judgment (Document No. 111) is DENIED.

Signed at Houston, Texas, this 11th day of June, 2008.

/s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff,	§	CIVIL ACTION
V.	§	NO. H-05-1155
2002 BMW, MODEL X-5,	§	
Defendant.	§	

CONSOLIDATED WITH

MINH "JEFF" HUYNH and, NU "CINDY" HUYNH	§	
Plaintiffs,	§	
v.	§	
UNITED STATES OF AMERICA, FERDINAND "ANDY" LARGE, JOHN HIERONYMUS, RAYMOND D'ALESSIO, and JOHN DOE # 1-10,	§	CIVIL ACTION NO. H-06-0399
Defendants.	§	

MEMORANDUM AND ORDER GRANTING PLAINTIFFS' AMENDED MOTION TO SET ASIDE DECLARATION OF FORFEITURE

Before the Court is Plaintiffs Minh "Jeff" Huynh and Nu "Cindy" Huynh's Amended Motion to Set Aside the Administrative Forfeiture (Document No.

64). Having considered the motion, the United States' response in opposition, the administrative record, and the applicable law, the Court ORDERS,[1] for the reasons set forth below, that the Huynhs' Amended Motion to Set Aside the Administrative Forfeiture (Document No. 64) is GRANTED.

I. Introduction and Procedural History

On May 26, 2004, the United States Drug Enforcement Administration ("DEA") seized jewelry, a 2002 BMW Model X-5 ("BMW"), cash, and other personal property from claimants Minh and Nu Huynh (the "Huynhs"). The DEA was acting under 21 U.S.C. § 881, which provides for the forfeiture of property that is used to facilitate or acquired with the proceeds of illegal narcotics trafficking. At the time of the seizure, the DEA provided receipts to the Huynhs for all property that was taken. On July 23, 2004, the DEA began administrative forfeiture proceedings against the various pieces of property by sending seven separate notices of forfeiture to the Huynhs. Five of the notices, including those for the cash and personal property, were addressed correctly and subsequently received by the Huynhs. However, the notices for the jewelry and the BMW were addressed with the incorrect zip code, and were returned to the

---

[1] On December 9, 2005, pursuant to the parties' consent, this case was transferred by the District Judge to the undersigned Magistrate Judge for all further proceedings. *See* Document No 38.

DEA as undeliverable. The DEA also sent Notices of Seizure for the BMW and the jewelry to Mike DeGeurin, a criminal defense attorney who was representing the Huynhs in the criminal matter relating to the DEA search of their home. However, Mr. DeGeurin did not acknowledge receipt of the notices until over a year later, on August 3, 2005, after receiving an inquiry from the Huynhs' attorney in this case.

The Huynhs made numerous inquiries and claims for the return of the jewelry, personal and business records and the BMW. The DEA, however, found the claims incomplete because they lacked the Asset Identification Number found on the Notice(s) of Seizure. The DEA sent the Huynhs an additional notice for the BMW on November 17, 2004, thereby enabling the Huynhs to file a claim for the BMW at the administrative level. That administrative claim for the BMW prompted the United States to file a judicial *in rem* forfeiture against the BMW, *United States v. 2002 BMW, Model X-5*, Civil Action Number H-05-1155. An additional notice to the correct address was never sent for the jewelry and, on December 20, 2004, the jewelry was declared administratively forfeited. The Huynhs filed suit under 18 U.S.C. § 983(e), seeking to set aside the declaration of forfeiture as to the jewelry, *Minh Huynh and Cindy Huynh v. United States, et al.*, Civil Action No. H-06-0399. In that same case, the Huynhs alleged claims for violations of their Fourth and Fifth Amendment rights, conversion and trespass to chattel against the

United States, three named DEA agents, and several John Doe Defendants, based on the seizure and forfeiture of the jewelry, and the seizure of their personal and business records, $1,000 cash and the personal property that was in the BMW at the time the BMW was seized. As relief, the Huynhs' asked for return of the jewelry or its monetary equivalent, and, in the alternative, damages.

The two related cases were consolidated by Order entered on February 15, 2006. (Document No. 42). Subsequent to the consolidation, the Huynhs amended their complaint to delete their claims against the individual defendants, and to delete their tort claims against the United States as they related to the seizure and forfeiture of the jewelry. Therefore, the Huynhs' tort claims against the Government relate to the United States' seizure of their personal and business records, the $1,000 in cash, and the personal property that was in the BMW at the time it was seized, none of which has been forfeited and none of which has been returned.

II. Discussion

In their Amended Motion to Set Aside the Forfeiture, the Huynhs argue that the administrative forfeiture of the jewelry should be set aside because they did not receive the required notice of the forfeiture that would have allowed them to file a

claim for the jewelry.[2] The Government, in response, argues that the notice given to the Huynhs was reasonably calculated to provide them with notice of the proposed forfeiture, and was therefore legally sufficient.

A. Motion to Set Aside Forfeiture

18 U.S.C. § 983 sets forth the rules and procedures that govern civil forfeiture proceedings. As specifically provided for by 18 U.S.C. § 983(e)(5), a motion to set aside the forfeiture is "the exclusive remedy for seeking to set aside a declaration of forfeiture under a civil forfeiture statute." Furthermore, 18 U.S.C. § 983(e)(1) provides:

> (1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set

---

[2] The Huynhs also argue that the administrative forfeiture should be set aside for three other reasons: (1) "the civil forfeiture statutes unconstitutionally create self-funding Executive agencies which are unaccountable to normal democratic processes"; (2) "the Declaration of Forfeiture, entered by the DEA, violates the Huynhs' due process right to a disinterested arbiter"; and (3) "the continued retention of the Jewelry without probable cause to believe that it is connected to illegal narcotics trafficking violates the Huynhs' Fourth Amendment right to be free from unreasonable seizures." Amended Motion (Document No. 64) at 1-2. Upon consideration of the statutory and due process notice issues raised by the Huynhs, the three other argued for bases for setting aside the forfeiture need not be addressed.

> aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if –
>
> > (A) the government knew, or reasonably should have known of the moving party's interest and failed to take reasonable steps to provide such party with notice;
> >
> > (B) the moving party did not know or have reason to know of the seizure with sufficient time to file a timely claim.

18 U.S.C. § 983(e)(1). To prevail on a motion to set aside an administrative forfeiture, it must be first shown that the Government failed to take "reasonable steps" to provide notice, as required by due process. The claimant must then also show that "the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim." 18 U.S.C. § 983(e)(1). In addition, due process requires that notice of administrative forfeiture be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the forfeiture action and afford them an opportunity to present their objections." *United States v. Robinson*, 434 F.3d 357, 362 (5th Cir. 2005). Moreover, "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S.Ct. 652 (1950). This actual notice requirement

means that notice must be "received and acknowledged" in order to comply with due process and survive a collateral attack. *United States v. Gagliardi,* 201 F.3d 429 (Table) (1st Cir. Mass. 1999); *Bye v. United States,* 105 F.3d 856, 857 (2nd Cir. 1997) (per curium).

In this case, it is undisputed that the notice related to the jewelry was not received by the Huynhs – one notice was incorrectly addressed to the Huynhs, and the other was sent to one of the Huynhs' attorneys, who did not open it or forward it to the Huynhs. The Government argues, primarily in reliance on the case of *Bye v. United States,* 105 F.3d 856 (2nd Cir. 1997), that the notice sent to the Huynhs attorney was legally sufficient and satisfied the requirements of due process. The circumstances at issue in *Bye,* however, are not the same as those at issue herein. *Bye* involved a pretrial detainee who was involved in an ongoing criminal proceeding for which he had retained counsel. The notice of seizure was sent to Bye's criminal defense attorney, who acknowledged its receipt. *Bye,* 105 F.3d at 857. Given counsel's acknowledged receipt of the notice and because his receipt of Bye's legal mail while Bye was incarcerated was reasonable and was to have been anticipated, the Second Circuit Court of Appeals concluded that the notice was "reasonably calculated, in the circumstances, to appraise Bye of the pendency of the administrative forfeiture proceeding and to afford him an opportunity to present his objections." *Id.*

Here, unlike in *Bye*, the Huynhs are not, and have not been incarcerated, and there has not been an indictment or any other criminal proceeding filed against them. *See United States v. Burks*, 49 Fed. Appx. 573, 575 (6th Cir. 2002) ("Due process can be satisfied by mailing notice of a forfeiture to a defendant's criminal attorney while the underlying criminal proceeding is pending."). In addition, the attorney to whom the notice was sent, Mr. DeGuerin, represented the Huynhs with respect to the search of their home and any criminal charges arising out of that search. DeGuerin was not retained to represent the Huynhs with respect to the seizure and forfeiture of their property – attorney Grossberg, who represents the Huynhs herein, was, and he so notified the DEA in writing well in advance of December 20, 2004, when the administrative declaration of forfeiture of the jewelry was made. *See* Exhibits 13 & 15 to Amended Motion (Document No. 64). Attorney Grossberg also informed the DEA in writing, well in advance of the administrative declaration of forfeiture of the jewelry, that the Huynhs had not received a notice for the jewelry. *Id.* Under the circumstances at issue in this case,[3] the notice sent to attorney DeGeurin was not notice to the Huynhs nor was such notice "reasonably calculated" to apprise the Huynhs of the pending forfeiture proceeding.

---

[3] It is also worth noting that the jewelry, in contrast to most of the other items that were seized and for which notice was received, is quite valuable.

18 U.S.C. § 983(a)(1)(F) requires that the Government send written notice to "the person from whom the property was seized." The Government did not properly send, and the Huynhs did not receive, such notice. Despite the fact that two of the seven notices were returned to the DEA as undeliverable, one for the car and one for the jewelry, no further steps were taken to resend the notice for the jewelry to the Huynhs. "A reasonable person presented with a letter that has been returned to sender will ordinarily attempt to resend it if it is practicable to do so." *Mullane,* 339 U.S. at 315. While the "Due Process Clause does not demand actual, successful notice, [] it does require a reasonable effort to give such notice." *United States v. Small,* 136 F.3d 1334, 1336-1337 (D.C. Cir. 1998) (finding that the Government had not satisfied due process where the forfeiture notices were returned undelivered and no further steps were taken to locate the claimant even though the Government had knowledge that he was in prison).

The Government argues, in reliance on *Robinson,* that actual receipt is not required to satisfy Due Process. *Robinson,* 434 F.3d 357, 362. However, in *Robinson,* the Government tried numerous times sending the notices to correct addresses. Here, the DEA tried once to send the notice to an address they incorrectly labeled. *Id.* In addition, it was only the notices for the jewelry and the BMW that were incorrectly addressed with the wrong zip code. The BMW notice was, upon its return as undeliverable,

re-sent to the correct address. The notice for the jewelry was, unexplainably, not re-sent. Here, given that the notice for the jewelry was addressed incorrectly, and given the filing by the Huynhs of administrative claims to the other property that was seized as well as the Huynhs' efforts to seek information about the jewelry through attorney Grossberg, the Government did not take "reasonable steps" to provide the Huynhs with notice. *See e.g. Barrera-Montenegro,* 74 F.3d 657 (5th Cir. 1996) (setting aside, on notice grounds, an administrative forfeiture where the claimant was never charged with an offense, the notice mailed to the claimant was returned unclaimed, and an attorney representing the claimant contacted the DEA about the return of the funds but was not informed of the DEA' s intent to forfeit the money); *see also Jones v. Flowers*, 126 S. Ct. 1708, 1713 (2006) ("We hold that when mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so.").

As for the second requirement, that "the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim," 18 U.S.C. § 983(e)(1), the Government seeks to prove the Huynhs "knew" of the seizure because they had received the other five notices in addition to the receipts the DEA provided at the seizure. However, the knowledge must enable the claimant to "file a timely claim". § 983(e)(1)(B). The Huynhs have shown

that they tried to use their "knowledge" of their BMW seizure to file a claim without having received notice and were denied because they lacked the Asset Identification Number required to make an effective claim. Subsequently, the Government sent a second notice to the correct address for the BMW, but not the jewelry. Therefore, with respect to the jewelry seized, the Huynhs never had the "knowledge" required to enable them to file a timely claim.

The Government argues that it matters only whether the Huynhs knew the jewelry was in fact seized rather than of the intent to forfeit. However, this understanding of the notice requirement goes against the statutory language of § 983, which explicitly requires written notice. On the declaration of forfeiture, the Government's counsel affirms that in addition to publication, notification was sent to all parties with an interest in the property. This language equates with an understanding that more than mere knowledge of the seizure is required. Therefore, the Huynhs did not know or have reason to know of the seizure of the jewelry such that they could have filed a timely claim for the return of the jewelry.

Upon this record, where both requirements set forth in § 983(e)(1) for the setting aside of a forfeiture have been met, and where the Government's efforts were not reasonably calculated to provide the Huynhs with notice of the intended forfeiture such that a claim could be made for the return of the jewelry, the forfeiture of the jewelry will be set aside, but "without

prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the [Huynhs'] interest". § 983(e)(2).

III. Conclusion and Order

Based on the foregoing and the conclusion that notice for the seizure of the jewelry did not comply with the statutory requirements or due process, it is

ORDERED that Plaintiff's Amended Motion to Set Aside the Forfeiture (Document No. 64) is GRANTED, and the December 20, 2004 administrative forfeiture of the jewelry at issue herein is SET ASIDE. This setting aside of the forfeiture is, notwithstanding the expiration of any applicable statue of limitations, without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the Huynhs in the jewelry.

Signed at Houston, Texas, this 27th day of February, 2007.

/s/ Frances H. Stacy
FRANCES H. STACY
UNITED STATES
MAGISTRATE JUDGE

18 U.S.C. § 983. General rules for civil forfeiture proceedings

(a) Notice; claim; complaint. –

(1)(A)(i) Except as provided in clauses (ii) through (v), in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute, with respect to which the Government is required to send written notice to interested parties, such notice shall be sent in a manner to achieve proper notice as soon as practicable, and in no case more than 60 days after the date of the seizure.

(ii) No notice is required if, before the 60-day period expires, the Government files a civil judicial forfeiture action against the property and provides notice of that action as required by law.

(iii) If, before the 60-day period expires, the Government does not file a civil judicial forfeiture action, but does obtain a criminal indictment containing an allegation that the property is subject to forfeiture, the Government shall either –

(I) send notice within the 60 days and continue the nonjudicial civil forfeiture proceeding under this section; or

(II) terminate the nonjudicial civil forfeiture proceeding, and take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute.

(iv) In a case in which the property is seized by a State or local law enforcement agency and turned over to a Federal law enforcement agency for the purpose of forfeiture under Federal law, notice shall be sent not more than 90 days after the date of seizure by the State or local law enforcement agency.

(v) If the identity or interest of a party is not determined until after the seizure or turnover but is determined before a declaration of forfeiture is entered, notice shall be sent to such interested party not later than 60 days after the determination by the Government of the identity of the party or the party's interest.

(B) A supervisory official in the headquarters office of the seizing agency may extend the period for sending notice under subparagraph (A) for a period not to exceed 30 days (which period may not be further extended except by a court), if the official determines that the conditions in subparagraph (D) are present.

(C) Upon motion by the Government, a court may extend the period for sending notice under subparagraph (A) for a period not to exceed 60 days, which period may be further extended by the court for 60-day periods, as necessary, if the court determines, based on a written certification of a supervisory official in the headquarters office of the seizing agency, that the conditions in subparagraph (D) are present.

(D) The period for sending notice under this paragraph may be extended only if there is

reason to believe that notice may have an adverse result, including –

(i) endangering the life or physical safety of an individual;

(ii) flight from prosecution;

(iii) destruction of or tampering with evidence;

(iv) intimidation of potential witnesses; or

(v) otherwise seriously jeopardizing an investigation or unduly delaying a trial.

(E) Each of the Federal seizing agencies conducting nonjudicial forfeitures under this section shall report periodically to the Committees on the Judiciary of the House of Representatives and the Senate the number of occasions when an extension of time is granted under subparagraph (B).

(F) If the Government does not send notice of a seizure of property in accordance with subparagraph (A) to the person from whom the property was seized, and no extension of time is granted, the Government shall return the property to that person without prejudice to the right of the Government to commence a forfeiture proceeding at a later time. The Government shall not be required to return contraband or other property that the person from whom the property was seized may not legally possess.

(2)(A) Any person claiming property seized in a nonjudicial civil forfeiture proceeding under

a civil forfeiture statute may file a claim with the appropriate official after the seizure.

(B) A claim under subparagraph (A) may be filed not later than the deadline set forth in a personal notice letter (which deadline may be not earlier than 35 days after the date the letter is mailed), except that if that letter is not received, then a claim may be filed not later than 30 days after the date of final publication of notice of seizure.

(C) A claim shall –

(i) identify the specific property being claimed;

(ii) state the claimant's interest in such property; and

(iii) be made under oath, subject to penalty of perjury.

(D) A claim need not be made in any particular form. Each Federal agency conducting nonjudicial forfeitures under this section shall make claim forms generally available on request, which forms shall be written in easily understandable language.

(E) Any person may make a claim under subparagraph (A) without posting bond with respect to the property which is the subject of the claim.

(3)(A) Not later than 90 days after a claim has been filed, the Government shall file a complaint for forfeiture in the manner set forth in the Supplemental Rules for Certain Admiralty

and Maritime Claims or return the property pending the filing of a complaint, except that a court in the district in which the complaint will be filed may extend the period for filing a complaint for good cause shown or upon agreement of the parties.

(B) If the Government does not –

(i) file a complaint for forfeiture or return the property, in accordance with subparagraph (A); or

(ii) before the time for filing a complaint has expired –

(I) obtain a criminal indictment containing an allegation that the property is subject to forfeiture; and

(II) take the steps necessary to preserve its right to maintain custody of the property as provided in the applicable criminal forfeiture statute,

the Government shall promptly release the property pursuant to regulations promulgated by the Attorney General, and may not take any further action to effect the civil forfeiture of such property in connection with the underlying offense.

(C) In lieu of, or in addition to, filing a civil forfeiture complaint, the Government may include a forfeiture allegation in a criminal indictment. If criminal forfeiture is the only forfeiture proceeding commenced by the Government, the Government's right to continued possession of the

property shall be governed by the applicable criminal forfeiture statute.

(D) No complaint may be dismissed on the ground that the Government did not have adequate evidence at the time the complaint was filed to establish the forfeitability of the property.

(4)(A) In any case in which the Government files in the appropriate United States district court a complaint for forfeiture of property, any person claiming an interest in the seized property may file a claim asserting such person's interest in the property in the manner set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims, except that such claim may be filed not later than 30 days after the date of service of the Government's complaint or, as applicable, not later than 30 days after the date of final publication of notice of the filing of the complaint.

(B) A person asserting an interest in seized property, in accordance with subparagraph (A), shall file an answer to the Government's complaint for forfeiture not later than 20 days after the date of the filing of the claim.

(b) Representation. –

(1)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the person is represented by counsel appointed under section 3006A of this title in connection with a related criminal case, the court

may authorize counsel to represent that person with respect to the claim.

(B) In determining whether to authorize counsel to represent a person under subparagraph (A), the court shall take into account such factors as –

(i) the person's standing to contest the forfeiture; and

(ii) whether the claim appears to be made in good faith.

(2)(A) If a person with standing to contest the forfeiture of property in a judicial civil forfeiture proceeding under a civil forfeiture statute is financially unable to obtain representation by counsel, and the property subject to forfeiture is real property that is being used by the person as a primary residence, the court, at the request of the person, shall insure that the person is represented by an attorney for the Legal Services Corporation with respect to the claim.

(B)(i) At appropriate times during a representation under subparagraph (A), the Legal Services Corporation shall submit a statement of reasonable attorney fees and costs to the court.

(ii) The court shall enter a judgment in favor of the Legal Services Corporation for reasonable attorney fees and costs submitted pursuant to clause (i) and treat such judgment as payable under section 2465 of title 28, United States Code, regardless of the outcome of the case.

(3) The court shall set the compensation for representation under this subsection, which shall be equivalent to that provided for court-appointed representation under section 3006A of this title.

(c) **Burden of proof.** – In a suit or action brought under any civil forfeiture statute for the civil forfeiture of any property –

(1) the burden of proof is on the Government to establish, by a preponderance of the evidence, that the property is subject to forfeiture;

(2) the Government may use evidence gathered after the filing of a complaint for forfeiture to establish, by a preponderance of the evidence, that property is subject to forfeiture; and

(3) if the Government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, or was involved in the commission of a criminal offense, the Government shall establish that there was a substantial connection between the property and the offense.

(d) **Innocent owner defense.** –

(1) An innocent owner's interest in property shall not be forfeited under any civil forfeiture statute. The claimant shall have the burden of proving that the claimant is an innocent owner by a preponderance of the evidence.

(2)(A) With respect to a property interest in existence at the time the illegal conduct giving rise to forfeiture took place, the term "innocent owner" means an owner who –

(i) did not know of the conduct giving rise to forfeiture; or

(ii) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property.

(B)(i) For the purposes of this paragraph, ways in which a person may show that such person did all that reasonably could be expected may include demonstrating that such person, to the extent permitted by law –

(I) gave timely notice to an appropriate law enforcement agency of information that led the person to know the conduct giving rise to a forfeiture would occur or has occurred; and

(II) in a timely fashion revoked or made a good faith attempt to revoke permission for those engaging in such conduct to use the property or took reasonable actions in consultation with a law enforcement agency to discourage or prevent the illegal use of the property.

(ii) A person is not required by this subparagraph to take steps that the person reasonably believes would be likely to subject any person (other than the person whose conduct gave rise to the forfeiture) to physical danger.

(3)(A) With respect to a property interest acquired after the conduct giving rise to the forfeiture has taken place, the term "innocent owner" means a person who, at the time that person acquired the interest in the property –

(i) was a bona fide purchaser or seller for value (including a purchaser or seller of goods or services for value); and

(ii) did not know and was reasonably without cause to believe that the property was subject to forfeiture.

(B) An otherwise valid claim under subparagraph (A) shall not be denied on the ground that the claimant gave nothing of value in exchange for the property if –

(i) the property is the primary residence of the claimant;

(ii) depriving the claimant of the property would deprive the claimant of the means to maintain reasonable shelter in the community for the claimant and all dependents residing with the claimant;

(iii) the property is not, and is not traceable to, the proceeds of any criminal offense; and

(iv) the claimant acquired his or her interest in the property through marriage, divorce, or legal separation, or the claimant was the spouse or legal dependent of a person whose death resulted in the transfer

of the property to the claimant through inheritance or probate,

except that the court shall limit the value of any real property interest for which innocent ownership is recognized under this subparagraph to the value necessary to maintain reasonable shelter in the community for such claimant and all dependents residing with the claimant.

(4) Notwithstanding any provision of this subsection, no person may assert an ownership interest under this subsection in contraband or other property that it is illegal to possess.

(5) If the court determines, in accordance with this section, that an innocent owner has a partial interest in property otherwise subject to forfeiture, or a joint tenancy or tenancy by the entirety in such property, the court may enter an appropriate order –

(A) severing the property;

(B) transferring the property to the Government with a provision that the Government compensate the innocent owner to the extent of his or her ownership interest once a final order of forfeiture has been entered and the property has been reduced to liquid assets; or

(C) permitting the innocent owner to retain the property subject to a lien in favor of the Government to the extent of the forfeitable interest in the property.

(6) In this subsection, the term "owner" –

(A) means a person with an ownership interest in the specific property sought to be forfeited, including a leasehold, lien, mortgage, recorded security interest, or valid assignment of an ownership interest; and

(B) does not include –

(i) a person with only a general unsecured interest in, or claim against, the property or estate of another;

(ii) a bailee unless the bailor is identified and the bailee shows a colorable legitimate interest in the property seized; or

(iii) a nominee who exercises no dominion or control over the property.

(e) Motion to set aside forfeiture. –

(1) Any person entitled to written notice in any nonjudicial civil forfeiture proceeding under a civil forfeiture statute who does not receive such notice may file a motion to set aside a declaration of forfeiture with respect to that person's interest in the property, which motion shall be granted if –

(A) the Government knew, or reasonably should have known, of the moving party's interest and failed to take reasonable steps to provide such party with notice; and

(B) the moving party did not know or have reason to know of the seizure within sufficient time to file a timely claim.

(2)(A) Notwithstanding the expiration of any applicable statute of limitations, if the court grants a motion under paragraph (1), the court shall set aside the declaration of forfeiture as to the interest of the moving party without prejudice to the right of the Government to commence a subsequent forfeiture proceeding as to the interest of the moving party.

(B) Any proceeding described in subparagraph (A) shall be commenced –

(i) if nonjudicial, within 60 days of the entry of the order granting the motion; or

(ii) if judicial, within 6 months of the entry of the order granting the motion.

(3) A motion under paragraph (1) may be filed not later than 5 years after the date of final publication of notice of seizure of the property.

(4) If, at the time a motion made under paragraph (1) is granted, the forfeited property has been disposed of by the Government in accordance with law, the Government may institute proceedings against a substitute sum of money equal to the value of the moving party's interest in the property at the time the property was disposed of.

(5) A motion filed under this subsection shall be the exclusive remedy for seeking to set

aside a declaration of forfeiture under a civil forfeiture statute.

(f) Release of seized property. –

(1) A claimant under subsection (a) is entitled to immediate release of seized property if –

(A) the claimant has a possessory interest in the property;

(B) the claimant has sufficient ties to the community to provide assurance that the property will be available at the time of the trial;

(C) the continued possession by the Government pending the final disposition of forfeiture proceedings will cause substantial hardship to the claimant, such as preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless;

(D) the claimant's likely hardship from the continued possession by the Government of the seized property outweighs the risk that the property will be destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding; and

(E) none of the conditions set forth in paragraph (8) applies.

(2) A claimant seeking release of property under this subsection must request possession of the property from the appropriate official, and the request must set forth the basis on which the requirements of paragraph (1) are met.

(3)(A) If not later than 15 days after the date of a request under paragraph (2) the property has not been released, the claimant may file a petition in the district court in which the complaint has been filed or, if no complaint has been filed, in the district court in which the seizure warrant was issued or in the district court for the district in which the property was seized.

(B) The petition described in subparagraph (A) shall set forth –

(i) the basis on which the requirements of paragraph (1) are met; and

(ii) the steps the claimant has taken to secure release of the property from the appropriate official.

(4) If the Government establishes that the claimant's claim is frivolous, the court shall deny the petition. In responding to a petition under this subsection on other grounds, the Government may in appropriate cases submit evidence ex parte in order to avoid disclosing any matter that may adversely affect an ongoing criminal investigation or pending criminal trial.

(5) The court shall render a decision on a petition filed under paragraph (3) not later than 30 days after the date of the filing, unless such 30-day limitation is extended by consent of the parties or by the court for good cause shown.

(6) If –

(A) a petition is filed under paragraph (3); and

(B) the claimant demonstrates that the requirements of paragraph (1) have been met,

the district court shall order that the property be returned to the claimant, pending completion of proceedings by the Government to obtain forfeiture of the property.

(7) If the court grants a petition under paragraph (3) –

(A) the court may enter any order necessary to ensure that the value of the property is maintained while the forfeiture action is pending, including –

(i) permitting the inspection, photographing, and inventory of the property;

(ii) fixing a bond in accordance with rule E(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims; and

(iii) requiring the claimant to obtain or maintain insurance on the subject property; and

(B) the Government may place a lien against the property or file a lis pendens to ensure that the property is not transferred to another person.

(8) This subsection shall not apply if the seized property –

(A) is contraband, currency, or other monetary instrument, or electronic funds unless such currency or other monetary instrument or electronic funds constitutes the assets of a legitimate business which has been seized;

(B) is to be used as evidence of a violation of the law;

(C) by reason of design or other characteristic, is particularly suited for use in illegal activities; or

(D) is likely to be used to commit additional criminal acts if returned to the claimant.

(g) Proportionality. –

(1) The claimant under subsection (a)(4) may petition the court to determine whether the forfeiture was constitutionally excessive.

(2) In making this determination, the court shall compare the forfeiture to the gravity of the offense giving rise to the forfeiture.

(3) The claimant shall have the burden of establishing that the forfeiture is grossly disproportional by a preponderance of the evidence at a hearing conducted by the court without a jury.

(4) If the court finds that the forfeiture is grossly disproportional to the offense it shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.

(h) Civil fine. –

(1) In any civil forfeiture proceeding under a civil forfeiture statute in which the Government prevails, if the court finds that the claimant's assertion of an interest in the property was frivolous, the court may impose a civil fine on the claimant of an amount equal to 10 percent of the value of the forfeited property, but in no event shall the fine be less than $250 or greater than $5,000.

(2) Any civil fine imposed under this subsection shall not preclude the court from imposing sanctions under rule 11 of the Federal Rules of Civil Procedure.

(3) In addition to the limitations of section 1915 of title 28, United States Code, in no event shall a prisoner file a claim under a civil forfeiture statute or appeal a judgment in a civil action or proceeding based on a civil forfeiture statute if the prisoner has, on three or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous or malicious, unless the prisoner shows extraordinary and exceptional circumstances.

(i) Civil forfeiture statute defined. – In this section, the term "civil forfeiture statute" –

(1) means any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense; and

(2) does not include –

(A) the Tariff Act of 1930 or any other provision of law codified in title 19;

(B) the Internal Revenue Code of 1986;

(C) the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 301 et seq.);

(D) the Trading with the Enemy Act (50 U.S.C. App. 1 et seq.) or the International Emergency Economic Powers Act (IEEPA) (50 U.S.C. 1701 et seq.); or

(E) section 1 of title VI of the Act of June 15, 1917 (40 Stat. 233; 22 U.S.C. 401).

(j) **Restraining orders; protective orders.** –

(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of satisfactory performance bonds, create receiverships, appoint conservators, custodians, appraisers, accountants, or trustees, or take any other action to seize, secure, maintain, or preserve the availability of property subject to civil forfeiture –

(A) upon the filing of a civil forfeiture complaint alleging that the property with respect to which the order is sought is subject to civil forfeiture; or

(B) prior to the filing of such a complaint, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that –

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(2) An order entered pursuant to paragraph (1)(B) shall be effective for not more than 90 days, unless extended by the court for good cause shown, or unless a complaint described in paragraph (1)(A) has been filed.

(3) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when a complaint has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought is subject to civil forfeiture and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than 10 days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered

under this paragraph shall be held at the earliest possible time and prior to the expiration of the temporary order.

(4) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(Added Pub.L. 106-185, § 2(a), Apr. 25, 2000, 114 Stat. 202, and amended Pub.L. 106-185, § 9, Apr. 25, 2000, 114 Stat. 216; Pub.L. 106-561, § 3(a), Dec. 21, 2000, 114 Stat. 2791; Pub.L. 107-56, Title III, § 316(d), Oct. 26, 2001, 115 Stat. 310.)

42 U.S.C. § 2465. Return of property to claimant; liability for wrongful seizure; attorney fees, costs, and interest

(a) Upon the entry of a judgment for the claimant in any proceeding to condemn or forfeit property seized or arrested under any provision of Federal law –

(1) such property shall be returned forthwith to the claimant or his agent; and

(2) if it appears that there was reasonable cause for the seizure or arrest, the court shall cause a proper certificate thereof to be entered and, in such case, neither the person who made the seizure or arrest nor the prosecutor shall be liable to suit or judgment on account of such suit or prosecution, nor shall the claimant be entitled to costs, except as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), in any civil proceeding to forfeit property under any provision of Federal law in which the claimant substantially prevails, the United States shall be liable for –

(A) reasonable attorney fees and other litigation costs reasonably incurred by the claimant;

(B) post-judgment interest, as set forth in section 1961 of this title; and

(C) in cases involving currency, other negotiable instruments, or the proceeds of an interlocutory sale –

(i) interest actually paid to the United States from the date of seizure or arrest of the property that resulted from the investment of the property in an interest-bearing account or instrument; and

(ii) an imputed amount of interest that such currency, instruments, or proceeds would have earned at the rate applicable to the 30-day Treasury Bill, for any period during which no interest was paid (not including any period when the property reasonably was in use as evidence in an official proceeding or in conducting scientific tests for the purpose of collecting evidence), commencing 15 days after the property was seized by a Federal law enforcement agency, or was turned over to a Federal law enforcement agency by a State or local law enforcement agency.

(2)(A) The United States shall not be required to disgorge the value of any intangible benefits nor make any other payments to the claimant not specifically authorized by this subsection.

(B) The provisions of paragraph (1) shall not apply if the claimant is convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law.

(C) If there are multiple claims to the same property, the United States shall not be liable for costs and attorneys fees associated with any such claim if the United States –

(i) promptly recognizes such claim;

(ii) promptly returns the interest of the claimant in the property to the claimant, if the property can be divided without difficulty and there are no competing claims to that portion of the property;

(iii) does not cause the claimant to incur additional, reasonable costs or fees; and

(iv) prevails in obtaining forfeiture with respect to one or more of the other claims.

(D) If the court enters judgment in part for the claimant and in part for the Government, the court shall reduce the award of costs and attorney fees accordingly.

(June 25, 1948, c. 646, 62 Stat. 975; Apr. 25, 2000, Pub.L. 106-185, § 4(a), 114 Stat. 211.)